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IN THE

Supreme Court of the United States

October Term, 1941

No. 72

Ernest Cohen, International Association, Local Union Nos. 138 and 66, Petitioners,

v.

Lone Star Cement Corp., Inc., and Lehigh's Division of E. H. Vogt & Co., Respondents.

MOTION TO ADD AS RESPONDENT PARTY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 73

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128 AND 633, *Petitioners*,

v.

LION DRY GOODS, INC., AND LASALLE'S DIVISION OF R. H. MACY & CO., *Respondents*.

MOTION TO ADD OR SUBSTITUTE PARTY PETITIONER AND STATEMENT IN OPPOSITION TO THE SUGGESTION OF MOOTNESS

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioners respectfully move the court to add or substitute as a party Petitioner in this Court the following party: Retail Clerks International Association, Local 954. In suport of this motion, Petitioners show as follows:

1. In the Brief for Respondents, it is stated that the present Petitioners have "merged" with the aforementioned Local 954. Respondents suggest that this cause may have abated or become moot as a consequence of this merger.

2. It is true that the Petitioners herein have "merged" with Local 954 of the same International Union. Local 954 is not a "new" organization but was a pre-existing organization which assumed all the rights and obligations of the named Petitioners herein.

3. The "merger" of these local labor organizations occurred in January, 1960, after the institution of the action but before formal entry of judgment by the District Court.

4. The "merger" was unanimously approved by the memberships of the local unions, in accordance with applicable provisions of their by-laws and the constitution of their parent labor organization, Retail Clerks International Association.

5. The Petitioners before the Court continue to function as separate divisions of Local 954, and these divisions retain the same physical offices as well as the same officers, representatives and employees which they had before the merger. They hold separate meetings of their memberships, as they did before the merger, and each division conducts its own affairs.

6. This litigation is still very much alive and vital. Indeed, Local 954 has financed and prosecuted this litigation through the District Court, the Court of Appeals and in this Court on behalf of its divisions. All other contract rights and obligations of the present Petitioners have been assumed and prosecuted in the name of Local 954 without interruption.

7. The Petitioners before the Court and Local 954 functioned jointly as a "Council" before the merger, and they now function as a single local labor organization. The present Petitioners have not ceased to exist or to function. They have merely changed their formal

names and merged their rights and obligations for the purpose of operating more effectively.

8. As a practical matter, the present Petitioners continue to function largely as they have in the past.

9. If the Court reverses the judgment of the Court below, Local 954 intends to prosecute the action to a conclusion before the District Court.

10. Counsel apologize to the Court for having failed to file this motion at an earlier date, but they had intended to respond to this question in a Reply Brief, until they were advised by the Clerk that better procedure required the filing of this Motion.

11. Washington counsel, who have had principal responsibility for the appeal in this Court, express their sincere regrets to the Court for having not acted earlier to remedy this matter. However, they were unaware of the merger until it was called to their attention by Respondent's Brief.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO ADD OR SUBSTITUTE PARTY PETITIONER AND IN OPPOSITION TO THE SUGGESTION OF MOOTNESS

The present appeal is very much alive. As suggested in the motion above, the present Petitioners exist and function as separate divisions of Local 954. All legal rights and duties of the Petitioners have been fully assumed in the name of Local 954. As a practical matter, the merger was a technical, organizational change which in no way affected the vitality of the substantive issues before the Court. Parenthetically, we point out that Respondents' suggestion of mootness merely asserts that the aforementioned "merger" occurred, not that the litigation before the Court has abated in any practical sense.

A recent decision of the Court deals with this question and squarely holds that a "merger" of two labor organizations does not abate or make moot an appeal in this Court. *Labor Board v. Insurance Agents International Union, AFL-CIO,* 361 U.S. 872 (1959). There a labor organization, respondent in this Court, filed a statement suggesting mootness because it had merged with another pre-existing labor organization to form a single, new organization. It also filed a contingent motion to delete itself, the old labor organization, as a respondent before the Court. The petitioner, Labor Board, filed a counter-motion to add the new, "merged" labor organization as a party respondent. Dismissing the contentions of mootness and abatement, the Court said, 361 U.S. at 872, as follows:

> "The contentions raised by respondent's memorandum respecting abatement or mootness are overruled. . . . Consideration of petitioner's motion to join Insurance Workers International

> Union, AFL-CIO, and respondent's contingent motion to delete it as a party are postponed to the hearing of the case on the merits."

Having disposed of the mootness suggestion in the above-quoted order, the Court disposed of respondent's contingent motion to delete itself and the Labor Board's motion to add the merged organization in a footnote to the decision on the merits. *Labor Board* v. *Insurance Agents International Union, AFL-CIO,* 361 U.S. 477, 500, footnote #32 (1960).

> "After we granted certiorari, we postponed to the consideration of the case on the merits a motion by the Board to join as a party here Insurance Workers International Union, AFL-CIO, the style of a new union formed by merger of respondent and another union after the decision of this case in the Court of Appeals, and a contingent motion by respondent that it be deleted as a party. 361 U.S. 872. In the light of our ruling on the merits, there is little point in determining here and now what the legal status of the predecessor and successor union is, and if the issue ever becomes important, we think that the matter is best decided then. For what it is worth, we shall treat both as parties before us in this proceeding. The Board's motion is granted and respondent's is denied. See National Labor Relations Board v. Lion Oil Co., 352 U.S. 282."

In the *Lion Oil Co.* case, cited in the Court's decision above, the Monsanto Chemical Co. acquired all the rights and interests of respondent Lion Oil Co. while the case was pending review by the Court. On a joint motion by the petitioner and respondent, the Court granted the motion to add Monsanto Chemical Co. as a party respondent. 351 U.S. at 979.

In the case at bar, the present Petitioners have affiliated themselves with Local 954 but have retained separate, distinct and identifiable status within Local 954. Whether the relationship is technically one of merger, consolidation or amalgamation is, we believe, unimportant. What is important is the undisputed fact that the present litigation is very much alive. The rights and interests contested in the Court have not abated as a consequence of the technical change in the present Petitioners' legal status.

In the labor relations field, consolidations and mergers of labor organizations are commonplace. The National Labor Relations Board regularly authorizes successor labor organizations to assume the outstanding bargaining rights of predecessor organizations. The leading decision of the Board is *National Carbon Co.*, 116 NLRB 488 (1956), which authorized a merged labor organization to succeed to the certification and bargaining rights of a predecessor under certain conditions which are present in the case at bar. This decision was enforced by the Sixth Circuit, *Union Carbide & Corbon Co.* v. *Labor Board*, 244 F.2d 672 (6th Cir. 1957), and has been constantly cited as the leading NLRB decision on this question. See also Silverberg, How To Take A Case Before The National Labor Relations Board 176-177 (Rev. ed. 1959).

For the reasons stated herein and in the foregoing motion, it is respectfully submitted that Petitioners' Motion to Add or Substitute should be granted, and Respondent's suggestion of mootness or abatement

should be overruled. *Labor Board* v. *Insurance Agents International Union, AFL-CIO*, 361 U.S. 872 (1959).

Respectfully submitted,

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